

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TEON JAMEIR MITCHELL,

Defendant-Appellant.

UNPUBLISHED

May 11, 2001

No. 213400

Genesee Circuit Court

LC No. 98-001996-FC

Before: Smolenski, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of armed robbery, MCL 750.529; MSA 28.797, three counts of assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, one count of assault with intent to murder, MCL 750.83; MSA 28.278, one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count possession of a firearm by a felon, MCL 750.224(f); MSA 28.421(6). Defendant was sentenced, as a second habitual offender, MCL 769.10; MSA 28.1082, to concurrent sentences of twenty to fifty years' imprisonment for each count of armed robbery, assault with intent to commit armed robbery and assault with intent to murder, seven to fifteen years' imprisonment for the assault with intent to do great bodily harm less than murder conviction and three to seven and a half years' imprisonment for the possession of a firearm by a felon conviction. These sentences are to run consecutive to the two year felony-firearm sentence. We affirm.

Defendant argues that he was deprived of his Fifth Amendment right to remain silent and his Fourteenth Amendment right to due process when Officer Petrich was permitted to testify, over defendant's objection, to defendant's prearrest silence as substantive evidence of defendant's guilt. We disagree.

Although defendant argues that this is a constitutional issue, this Court has determined that the use of a defendant's prearrest silence as substantive evidence of guilt does not violate a defendant's constitutional rights and the issue must instead be examined to determine if the testimony regarding prearrest silence was admissible as evidence at trial. *People v Schollaert*,

194 Mich App 158, 166-167; 486 NW2d 312 (1992). Evidentiary issues are reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

In the present case, when the police officer asked defendant in the hospital who shot him, defendant was not in custody or being interrogated. As such, defendant had not been given his *Miranda*¹ warnings and such warnings were not required at that stage. Although defendant may have been the focus of a police investigation at that point, the relevant inquiry is whether he was subjected to police interrogation while in custody or deprived of his freedom of action in a significant way. *Schollaert, supra* at 165. See *Beckwith v United States*, 425 US 341; 96 S Ct 1612; 48 L Ed 2d 1 (1976). Because there is nothing in the record to indicate that defendant was subjected to police interrogation while in the hospital or that his silence was in reliance on the *Miranda* warnings, *People v Stewart (On Remand)*, 219 Mich App 38, 43; 555 NW2d 715 (1996); *Schollaert, supra*, we conclude that defendant was not deprived of his constitutional rights when evidence of his silence was admitted as substantive evidence at trial. *Schollaert, supra* at 166-167.

Having concluded that defendant's silence was not a constitutionally protected silence, we must next determine whether the testimony regarding his failure to answer the officer's question regarding who shot him was admissible under the Michigan Rules of Evidence. Relevant evidence is generally admissible at trial. MRE 401. Relevant evidence is that which has the tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 402. Petrich testified that in response to his question to defendant about who shot him, defendant stated that he did not want to answer any questions. We conclude that Petrich's testimony regarding defendant's silence was relevant to show defendant's consciousness of guilt because an innocent gunshot victim is not likely to refuse to describe the circumstances of the shooting to a police officer. *People v Collier*, 426 Mich 23, 34-35; 393 NW2d 346 (1986); *Schollaert, supra* at 160-161, 165-167. Defendant's refusal to answer the question regarding who shot him further suggests that he was shot under suspicious circumstances and was relevant to a determination of defendant's guilty knowledge. Finally, we are not persuaded that the probative value of Petrich's testimony was substantially outweighed by the danger of unfair prejudice. MRE 403. Under these circumstances, the trial court did not abuse its discretion in admitting the evidence.

Defendant next argues that he was deprived of his due process rights when the government lost the robber's blood sample prior to trial. We disagree. The issue whether a defendant's due process rights were violated is a question of law that this Court reviews de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

The United States Supreme Court has held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). See *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993); *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Defendant bears the burden

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 631 (1966).

of showing that the evidence was exculpatory or that the police acted in bad faith. *Johnson, supra* at 367. In the present case, it is undisputed that the blood sample taken from the door of the gasoline station was lost by the police. However, the record is devoid of any evidence that the police acted in bad faith when they lost the evidence. Moreover, while a DNA analysis of the blood sample may have inculpated or exculpated defendant as the perpetrator of the robbery, it is pure speculation to offer any conclusion on the result of a DNA analysis. Therefore, defendant has not met his burden to show that the evidence was exculpatory. *Hunter, supra; Johnson, supra*. Accordingly, the trial court did not violate defendant's due process rights by refusing to dismiss the case on the basis of the lost blood sample.

Defendant also argues that the trial court erred by failing to sua sponte give an adverse-inference instruction to the jury regarding the prosecution's loss of the blood sample. We disagree.

An appellate court is obligated to review only those issues which are properly raised and preserved. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). Defendant did not request the adverse-inference instruction to be given at trial and he did not object to the instructions as given. Therefore, this issue was not preserved and appellate review is foreclosed absent manifest injustice. MCL 768.29; MSA 28.1052; *People v Rice (On Remand)*, 235 Mich App 429, 443; 597 NW2d 843 (1999). Manifest injustice occurs when an erroneous or omitted instruction pertained to a basic and controlling issue in the case. *Rice, supra*.

"The failure of the court to instruct on any point of law shall not be a ground for setting aside the verdict of the jury unless such instruction is requested by counsel." MCL 768.29; MSA 28.1052. Our research has not revealed, and defendant has not cited, any case law requiring a trial court to sua sponte provide an adverse inference instruction to the jury where the government has lost or destroyed evidence. Further, given the absence of any evidence establishing that the DNA analysis of the blood sample was exculpatory, the omitted instruction did not pertain to a basic and controlling issue in the case. Reviewing the jury instructions in their entirety, we conclude that they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Mass*, 238 Mich App 333; 605 NW2d 322 (1999). Accordingly, we find no manifest injustice.²

Finally, defendant alleges prosecutorial misconduct during the prosecution's closing and rebuttal arguments. Specifically, defendant claims that the prosecution argued facts not in evidence by (1) asserting that a friend of defendant was the owner of the vehicle defendant entered immediately after the robbery, (2) contending that defendant committed perjury when he changed his testimony under oath regarding where he obtained the marijuana at issue, and (3) arguing that defendant was at the hospital only twelve minutes after the robbery occurred. We disagree.

² Defendant also contends that his trial counsel was ineffective for failing to request an adverse-inference instruction. However, because defendant failed to identify this issue in his statement of questions presented, we decline to consider this claim. MCR 7.212(C)(5); *People v Wilkins*, 184 Mich App 443, 451 n 4; 459 NW2d 57 (1990).

Defendant did not object to these instances of alleged prosecutorial misconduct at trial and did not preserve this issue for appeal. In the absence of a timely objection below, claims of prosecutorial misconduct are reviewed only if an instruction could not have cured the prejudicial effect or where failure to consider the issue would result in manifest injustice. *Stanaway, supra* at 687. Prosecutorial remarks are reviewed in context to determine whether defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995); *Rice, supra* at 435. A prosecutor may argue the evidence and all reasonable inferences drawn from the evidence, *Bahoda, supra* at 282, however, a prosecutor may not vouch for the credibility of witnesses or rely on facts not in evidence. *Stanaway, supra* at 686.

Contrary to defendant's contention, our independent review of the record reveals that there was adequate factual support for each of the prosecution's challenged statements. In any event, any prejudice arising from the prosecutor's statements could have been cured by a timely instruction. Further, the trial court instructed the jury that statements and arguments made by the attorneys were not evidence and could not be considered during deliberations. Accordingly, we find no manifest injustice.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter